INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Casados v. *United States*, 300 F. 2d 845, certiorari denied, 373 U.S. 938 — 8

Emspak v. *United States*, 349 U.S. 190 — 11

Johnson v. *United States*, 318 U.S. 189 — 10

Mills v. *United States*, 281 F. 2d 736 — 11

Namet v. *United States*, 373 U.S. 179 — 8, 9, 10

United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959 — 10

United States v. *Cardillo*, 316 F. 2d 606, certiorari denied, 375 U.S. 822 — 11

United States v. *Crosby*, 294 F. 2d 928, certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984 — 8

United States v. *Mercks*, 304 F. 2d 771 — 11

Constitution and statute:

Constitution of the United States, fifth amendment — 5, 8, 11

18 U.S.C. 2113(a) — 2

Miscellaneous:

5 Wigmore, *Evidence*, § 1391, 3d ed., 1940 — 11

737-693—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 160

HARRY R. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 331 F. 2d 265.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1964. A petition for rehearing was denied on May 12, 1964. The petition for a writ of certiorari was filed on June 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner's trial was unfair because a codefendant, while testifying as a court's witness, responded to several

questions by invoking the privilege against self-incrimination, and because the codefendant testified that he had pleaded guilty to the charge.

2. Whether petitioner was denied the right of cross-examination.

STATEMENT

In the United States District Court for the Southern District of Iowa, a grand jury returned an indictment charging petitioner and codefendant Frank Dalia with entering a federally insured bank with intent to commit larceny, in violation of 18 U.S.C. 2113(a) (I.R.1). Dalia, while in Indiana, pleaded guilty to the charge under Rule 20. A few weeks later, petitioner was tried before a jury and was convicted (I.R. 64, 147). He was sentenced to a term of 20 years imprisonment (I.R. 147). The court of appeals affirmed the conviction (Pet. App. 1–29; 331 F. 2d 265).

The pertinent facts may be summarized as follows:

1. Late one Sunday night, October 21, 1962, the night deposit safe inside a federally insured bank in Altoona, Iowa, was broken open and robbed of $6,535.50 (IV.R. 43–45). At 1:15 a.m. Monday morning, a state highway patrol officer, Calvin White, who did not know about the larceny, left Des Moines, drove east on Route 90 through the town of Altoona and continued east about 1½ miles to the Duffield farm where he left some papers in the mailbox (IV.R. 57–58). Between Altoona and the farm the highway was deserted except for a single car which passed the farm, traveling east, while he was occupied at the

mailbox. He saw no objects lying on the road (IV.R. 58, 81).

After completing his business, about 1:30 a.m., Officer White turned around and drove back toward Altoona. After traveling about ½ mile without seeing any traffic, he saw a DeSoto with Illinois license plates traveling south on a gravel road toward the highway. Turning up the gravel road, he stopped beside the DeSoto and said "hold it" (IV.R. 59–60). Almost immediately, the DeSoto drove away, turned east on to the highway, and accelerated to a speed of 100 miles per hour. Officer White gave chase at a distance of 300–400 feet. Just before passing the Duffield farm, he had to swerve suddenly from his lane to avoid hitting an object moving in the middle of the road. Then, to use his words, he saw paper "floating in the air and it just looked like I was driving through all kinds of paper flying around" (IV.R. 60–62). A few miles later, both cars passed a third car with Ohio license plates; and shortly after that, the DeSoto missed a sharp curve and spun off the road (IV.R. 63–64).

On reaching the damaged car, Officer White found petitioner's brother, who was dead, in the driver's seat, petitioner beside him in the front seat, and co-defendant Dalia in the back seat (IV.R. 64, 66). After spending an hour administering first aid and calling an ambulance for petitioner and Dalia, he returned to the place where he had seen the object moving, and there, beside the road, he found a bag of tools (IV.R. 66–67). Several other bags of tools and a wheelbarrow were packed into the trunk of the DeSoto

(IV.R. 167). On the front floorboard of the car, to the right where petitioner was sitting, lay a pair of canvas shoes (IV.R. 112, 163). Of the three occupants of the car, only petitioner was not wearing shoes after the accident (IV.R. 231–233; V.R. 276). Shortly after 5 a.m., Officer White and three others searched along the road. In the area where Officer White had seen the flying paper, scattered for a distance of some 1½ miles, they found over $1,000 in currency, over $4,500 in checks, deposit slips, and deposit envelopes. The checks, slips, and envelopes were known to have been stolen from the Altoona bank's night deposit safe (IV.R. 44–52, 75–78, 156–157, 209–219).

Experts from the F.B.I. Laboratory testified at the trial that markings left on the bank door and the safe could have been made only by a crowbar and a hammer from the tool bag found on the road by Officer White (IV.R. 67, 138–139, 159–164). On other tools from the same bag, the experts discovered dust and paint chips that corresponded to the insulation material and the two layers of paint used on the safe (IV. R. 118–122). The treads on the soles of the canvas shoes—the ones found by petitioner's seat in the car—fit a tread mark left at the scene of the crime, and in the treads was soil that matched soil found beside the safe (IV.R. 112, 122–125, 131–132, 150, 159–163).

2. Before the trial, codefendant Dalia was transferred from Indiana to Iowa (IV.R. 240–241). In his opening statement to the jury, the Assistant United State Attorney described Dalia as a passenger in the car and as having "entered a plea to the charge of

the Altoona State Bank." Dalia, he said, would be one of the last witnesses and would be asked what he knew about the events charged in the indictment (IV.R. 40). Neither of petitioner's two trial counsel objected.

On the second day of trial, near the end of the government's case and in the presence of the jury, the Assistant asked that Dalia be called as a court's witness for cross-examination "in view of the fact that he was named in this indictment" (IV.R. 234). Petitioner did not object. After the jury left the courtroom, the Assistant argued that Dalia had "information bearing on this case," but that the government would not vouch for his credibility (IV.R. 235–236; Pet. App. 5).[1] The Court granted the request over petitioner's objection to calling any witness as a court's witness (IV.R. 235).

After the jury returned, the government began its examination of Dalia, which may be summarized as follows: (1) after Dalia gave his name, he responded to the second question—whether he was also known as Anthony Walters—by invoking the Fifth Amendment; (2) next, he denied having been indicted for the Altoona bank theft, but invoked the Fifth Amendment when asked if he pleaded guilty to such a charge; (3) after the court disallowed the claim of privilege, he admitted entering the plea; (4) he answered the next series of questions, testifying that on October 22, he was in an automobile accident 5½ miles east of

[1] Since most of the trial transcript concerning Dalia's testimoney is set forth in the opinion below, paralleled citations have been given to the pages of the opinion, printed in petitioner's appendix.

Altoona; (5) then when asked who else was in the car and where he was the previous evening, he again invoked the privilege; (6) next, he answered two questions by saying that he had lived in Chicago his entire life; (7) he claimed the privilege against five consecutive questions, which asked how long he had been in Iowa and whether he knew or had traveled with petitioner or his brother; (8) in answer to the next two questions, he testified that he was taken to a Des Moines hospital after the accident; and (9) he responded to the final three questions—how long he was in Altoona, how long petitioner was there, and whether he entered the bank—by invoking the Fifth Amendment (IV.R. 236–240; Pet. App. 6–8). Petitioner did not object at any time during the examination.

When counsel for petitioner took the witness, he brought out that Dalia was serving a sentence for a bank burglary in Indiana, and that he had been transported to Iowa for the trial.[2] Under further questioning, Dalia testified that he was unaware of his rights and desired the services of an attorney. At this time, the court excused the jury and, before adjourning for the day, probed deeper into Dalia's request for legal representation (IV.R. 240–243; Pet. App. 8–11).

Before the jury entered the courtroom the following morning, a Chicago attorney appeared for Dalia and informed the court that his client intended to

[2] No mention was made during the examination that Dalia's Indiana sentence ran concurrently with his sentence for entering the bank in Altoona.

appeal[3] or to attack collaterally the sentence on his plea of guilty—which Dalia claimed was coerced—to the Altoona bank burglary. The attorney further informed the court that he had advised Dalia not to answer any further questions at petitioner's trial because, should the attack be successful and should Dalia be tried later under the Altoona indictment, answering any questions would amount to self-incrimination (I. R. 64–67; V. R. 244–256).[4] At this time, petitioner's counsel moved for a mistrial and to strike Dalia's testimony (V. R. 258). Finding that the government had not acted intentionally and that there were no aggravating circumstances, the court denied both motions (V. R. 258–270, 360–361).

When the jury entered, the court ordered Dalia—despite his repeated protests that his "rights" were being violated—to take the witness stand. Petitioner's counsel, resuming cross-examination, asked the witness six questions: (1) his name; (2) whether he entered the Altoona bank; (3) whether he advised the government that he would not testify; (4) where he lived; (5) whether he had information to show petitioner innocent; and (6) whether, in view of his plea of guilty, he had been sentenced concurrently for the Altoona bank theft. Throughout the questioning, Dalia sat mute—never saying a word. Petitioner's requests that the

[3] The attorney believed that an appeal would be timely because the ten day period for taking an appeal expired while Dalia was without counsel and while he was being transported from Indiana to Iowa.

[4] Aside from his declared intention to appeal, Dalia was facing state charges in Iowa and South Dakota, involving different crimes, which arose from his association with petitioner (I. R. 19–21, 48–49).

witness be instructed to answer were denied, the court replying either the witness had already answered the question, or he was not required to answer, or both (V.R. 272–274; Pet. App. 12–13). When the examination ended, petitioner moved for a mistrial, claiming a denial of the right to cross-examine the witness (V.R. 275; Pet. App. 14).

None of the arguments of counsel to the jury mentioned Dalia's testimony. The judge charged the jury not to give any weight to Dalia's plea of guilty or his invoking of the Fifth Amendment (I.R. 77–78; V.R. 361–413; Pet. App. 19–20).

ARGUMENT

1. It is settled that a conviction will not be reversed merely because a codefendant has invoked the privilege against self incrimination or has revealed an earlier plea of guilty. To be sure, in some cases, where the government has acted improperly or the accused has been severely prejudiced, the trial may be so unfair as to require its reversal. *E.g., Namet* v. *United States,* 373 U.S. 179, 186–187; *Casados* v. *United States,* 300 F. 2d 845, 848 (C.A. 5), certiorari denied, 373 U.S. 938; *United States* v. *Crosby,* 294 F. 2d 928, 948–50 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States,* 368 U.S. 984. But the application of this rule to the facts of this case does not warrant review by this Court.

The government acted properly in asking that Dalia be called as a court witness. Since Dalia was shown to be involved, failure to call him could have given rise to an unfavorable inference if he were not produced. And since Dalia had already pleaded

guilty and received sentence, there was no reason to suppose that he would invoke the Fifth Amendment, although the government could not vouch for his credibility. *Namet* v. *United States*, 373 U.S. at 188. That Dalia had pleaded guilty was brought out early in the examination before it was clear that he would insist on claiming the privilege. Not until the next day did the government learn that Dalia was claiming the privilege because he intended to attack his guilty plea on appeal.[6]

Petitioner was not harmed by Dalia's testimony. Dalia did not incriminate petitioner. Indeed, petitioner made vigorous efforts to put before the jury the very matters of which he now complains. During the government's examination of Dalia, petitioner made no objection at any time.[6] Only on the next day, after the examination was over, did he move for a mistrial and to strike the testimony. And then, after making those motions, petitioner's counsel asked Dalia questions that required answers which would incriminate him.[7] Even when Dalia refused to an-

[5] The State charges against Dalia involving different crimes (see n. 4, *supra*) were never mentioned when his attorney explained why self-incrimination was being claimed. In any event, the government's knowledge of these charges did not prevent examination of Dalia on matters related to the Altoo a burglary, but unrelated to the State charges, for, as this court indicated in *Namet* v. *United States*, 373 U.S. at 188, the government had a right to question the witness on such nonprivileged matters.

[6] Nor did he object earlier in the trial when the government described Dalia as a codefendant who had pleaded to the charge (IV.R. 40, 234).

[7] Counsel asked Dalia whether he had any information that would show petitioner was innocent, and whether Dalia had

swer those or any other questions, counsel persisted by reminding the witness of his plea of guilty and by inquiring into the details of his sentence (IV.R. 274; Pet. App. 13). Such unusual tactics must be attributed to a desire "to nurse [the alleged prejudice] along to the point of reversibility" (*United States* v. *Agueci*, 310 F. 2d 817, 840 (C.A. 2), certiorari denied, 372 U.S. 959), or to a hope that Dalia, after showing his knowledge of the burglary by admitting his own guilt, would testify that petitioner was innocent. In either case, petitioner acquiesced in the course that the trial took and cannot now complain of matters which he chose to disregard.[8] *Namet* v. *United States*, 373 U.S. at 189; *Johnson* v. *United States*, 318 U.S. 189, 201.

Moreover, in the present case the evidence of guilt—which is set forth in detail in the Statement above—was overwhelming. None of the arguments of counsel to the jury referred to Dalia who, as noted, had given no testimony favorable or unfavorable to petitioner. The court cautioned the jury not to use the plea or the claim of privilege as evidence against petitioner. In such circumstances, petitioner was not denied a fair trial.[9]

---

entered the Altoona bank on October 22 (IV.R. 272, 273; Pet. App. 12, 13). The second question was identical to one asked earlier by the government, and which Dalia had answered by claiming the privilege.

[8] A further reason for thinking that petitioner's failure to object was not inadvertent is that his two trial counsel objected frequently at other times; in fact, during the 1½ days of trial before Dalia testified, they objected on 46 occasions.

[9] There is no conflict between the present case and the cases relied on by petitioner (Pet. 15). In those cases the circum-

2. Nor is there any merit to petitioner's contention that he was denied the right of cross-examination (Pet. 16). The right to cross-examine is the right to examine the witness on testimony which he has previously given, and the remedy for a denial of that right is to strike the earlier testimony. *E.g., United States* v. *Cardillo,* 316 F. 2d 606, 610–614 (C.A. 2), certiorari denied, 375 U.S. 822; 5 Wigmore, *Evidence,* § 1391 (3d ed., 1940). In the present case, when the government examined Dalia as a court's witness, his sole testimony consisted of a few collateral answers that were inconsequential to the trial. Therefore, there was nothing on which to cross-examine him. There is no denial of the right to cross-examine when a government witness, who did not incriminate the accused in his testimony on direct examination, invokes the Fifth Amendment [10] when cross-examined. *United States* v. *Mercks,* 304 F. 2d 771 (C.A. 4); *cf. United States* v. *Cardillo,* 316 F. 2d at 610–614.

---

stances were extremely aggravated or the Court merely held that a codefendant's plea of guilty is not evidence against an accused, a proposition not in issue in the present case.

[10] Although Dalia sat mute—instead of explicitly claiming the privilege against self-incrimination—when petitioner examined him, his attorney had earlier informed the court that he had advised his client to assert his Fifth Amendment rights by not answering any further questions (V.R. 244–256). Under the circumstances, Dalia's conduct was sufficient notice that he was claiming the privilege. *Mills* v. *United States,* 281 F. 2d 736, 740–742 (C.A. 4); see *Emspak* v. *United States,* 349 U.S. 190, 194.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

JULY 1964.